



The Impact of the EU Audiovisual Media Services (AVMS) Directive on Freedom of Speech in the Post-Communist Democracies of Central and South Eastern Europe

Country Report: *Bosnia and Herzegovina*

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Introduction

Bosnia and Herzegovina is passing the period of reshaping its institutional and administrative models regarding the audiovisual sector, in order to meet the complex challenges of EU integration, and the processes of liberalization and privatization in many key economic fields. A considerable step for this was made in 2001 by the establishment of a national convergent regulator for the communications and media sector, the Communications Regulatory Agency (RAK), the creation of which follows the best practice of EU countries and reflects the technology convergence between telecommunications and broadcasting services Europe-wide. Regulation of the communications sector is a complex and challenging trade-off between protecting consumers' interests and the promotion of competition, and the access of new players in the market without discouraging investment by consolidated market actors.

It is important to mention that in Bosnia and Herzegovina, as in many other transitional democracies, the media environment is characterized by the presence of a high number of "public broadcasters" (for example, broadcasters owned by public entities or funded through public finances, particularly at local level, which is a specific feature and a legacy of the pre-war era when most of the broadcasters were controlled directly by the State. Commercial broadcasting to a greater extent emerged only after 1996, with the support of the international community.

Taking into account Bosnia and Herzegovina's commitment to being a modern society with an economy and administration based on knowledge, skilled enough to join the EU, the application of the information-communications technologies (ICT) and building of an information society are parts of unavoidable road that will enable Bosnia and Herzegovina to take its place in the united Europe. Bosnia and Herzegovina must actively and rapidly act towards a reduction in the gap in technological development, considering that a process of transition from an industrial to information society has already moved quite ahead in developed societies.

1. New media and media convergence

Not so long ago, new media were predominantly broadcast or electronic (radio and TV in the first place), but today the phrase “new media” has been used more and more to mark new forms of interactive communication and information broadcast, such as the Internet. These, new, media are characterized by non-linear access to the content, interactivity and multimedia. New media has become more and more convergent.

In the communications sector, “convergence” refers to the intersection of broadcasting, telecommunications and other types of new technologies, transmitting audiovisual content to consumers through means that differ from traditional TV sets. Due to this phenomenon, new technologies are being introduced all around Europe such as digital television, interactive TV, IPTV, as well as mobile TV (TV content made available on mobile phones through DVBH and UMTS video services). Media in Bosnia and Herzegovina are gradually becoming convergent and they especially use the Internet for that reason. It is now possible to follow live streams of TV shows on webpages of public service broadcasters as well as many local and regional radio stations using the Internet’s potential to broadcast their programming.

The Communications Regulatory Agency of Bosnia and Herzegovina (RAK), together with their partners Autorita per le garanzie nelle comunicazioni (AGCOM) of Italy, participated in the EU CARDS Twinning Project *Support to the Communications regulatory Agency of Bosnia and Herzegovina 2005–2007*. This project intends to support RAK in reforming the Bosnia and Herzegovina audiovisual and electronic communications sector in a time when digitalization and convergent processes are deeply transforming the communications sector, pushing the introduction of innovative services, the development of new business models and the tendency towards vertical and horizontal integrations, thus bringing new challenges to national regulators.

2. The legal framework in the communication sector in Bosnia and Herzegovina

The Communications Regulatory Agency, in charge of regulating the communications sector, was established in March 2001 by the Decision of the High Representative and merging the competencies of two regulatory authorities – the Independent Media Commission and the Telecommunications Regulatory Agency. This was the first convergent regulator in the region in charge of regulating the entire communications sector as well as managing the radio frequency spectrum. The main duties of the Agency are: to promulgate rules on broadcasting and telecommunications, and ensure adherence thereto; to license broadcasters and telecommunications operators pursuant to the provisions of this Law, and monitor their compliance with license conditions; to plan, manage, allocate and assign the frequency spectrum and monitor the use of it as well as to maintain and publish a frequency usage plan for the whole territory of Bosnia and Herzegovina; to require the disclosure of such information as is necessary

for the due performance of its regulatory obligations; to apply technical and quality standards, for example, to ensure interconnection and functionality of public telecommunications networks and services; to establish and maintain a technical license fee system for both broadcasting and telecommunications; and such other duties as are assigned to it under the Law.

The Law on Communications (Official Gazette of Bosnia and Herzegovina, no. 31/2003) of Bosnia and Herzegovina entered into force in 2002 and confirmed the mandate and responsibilities of the RAK. It adopted a convergent approach with a wide scope including telecommunications, radio, broadcasting (including cable television) and associated services and facilities. According to the Law the broadcasting segment of the communication sector is defined as “any point-to-multipoint emission of signs, signals, text, images, sounds or data by wire, optical fibre, radio, or any other electromagnetic means intended for general reception by the public by means of receivers adapted for the purpose” and “any legal or physical person providing broadcasting”.¹ It also establishes a number of basic regulatory principles, which should define the scope of action of the RAK, such as:

- a) The protection of freedom of expression and diversity of opinion while respecting generally accepted standards of decency, non-discrimination, fairness, accuracy, and impartiality
- b) The development of professional and viable commercial and public broadcasters with the intention of striking an appropriate balance within the two
- c) The principle that broadcasters shall be separated from political control and manipulation
- d) Licenses shall be awarded on the basis of a process by which appropriate professional standards of program content, technical operation and financing are ensured
- e) Broadcast advertising shall be regulated so as to be consistent with the best European practice.

In order to guarantee the effectiveness of RAK action the Law attributes an enforcement power including the competence to impose sanctions in case of breaches of the Law or RAK decisions. Also, if a telecommunications or broadcasting network or service is being operated without a license, the Agency has the power to take all necessary steps to stop the activity of such operations. In case of different violations, the RAK can apply the following measures: oral and written warnings; inspection of licensed facilities; demands for action or cessation; financial penalty up to €75,000;

¹ Law on communications of Bosnia and Herzegovina (February 4, 2003), article 2, point 2 letters c and d.

order the interruption of broadcasting or the provision of telecommunications services for a period not exceeding three months; revocation of a license.

In accordance with the Bosnia and Herzegovina Law on Communications, and related to the regulatory work in the field of creating bylaws, so far the Agency (RAK) has created a number of various codes, rules and guidelines. Not neglecting any segment, the Broadcasting Code of Practice and the Advertising and Sponsorship Code could be specially emphasized. During 2006, the process of harmonizing the Advertising and Sponsorship Code with European regulation has been completed, as well as the harmonization of the Broadcasting Code of Practice with EU principles.

The Law on Public Broadcasting System of Bosnia and Herzegovina was passed by the Bosnia and Herzegovina Parliamentary Assembly on October 5, 2005. It was adopted in January 2006.

As a member of the Council of Europe, Bosnia and Herzegovina ratified the European Convention on Transfrontier Television in 2005, which establishes basic rules concerning the content of television transmission and specifically, among others, advertising and teleshopping, protection of minors and right of reply.

3. Did Bosnia and Herzegovina have public discussions on the draft AVMS Directive?

Unfortunately, the public of Bosnia and Herzegovina has had no opportunity yet to meet up with new European solutions for extending traditional media regulation. Nor have the media experts or organizations of such organized any debate on the AVMS Directive within the country, but some experts have participated in many international task forces and forums on media convergence and regulations.

So far, there has been only one conference in Sarajevo, organized by the Communicatory Regular Agency, on the topic *Convergence of media: the new challenges for regulators in Europe and in Bosnia and Herzegovina* where the AVMS Directive was just superficially mentioned. That was part of the presentation given by Marisa Fernandez Esteban, who represents the European Commission, on the topic: *Convergence of media in Europe: European Commission view*. She mentioned that the AVMSD contains “new rules covering all audiovisual media services within the EU market” and that its basic principles are “country of origin, protection of fundamental public interests: protection of minors, ban on hate speech, consumer protection, and common policy objectives such as the promotion of European works and independent productions”. Also, she said, main new issues of the future AVMSD are “technological neutrality, distinction between linear services and ‘on-demand’, minimum harmonization for ‘on-demand services’, product placement, and independence of national media regulation”. In sum, just brief and superficial facts on the new regulatory document have been presented without any possible negative effects or discussion on its effects on electronic media or Internet content, or a possible negative impact on basic human rights, such as freedom of speech.

Furthermore, main critics from “Budapest Declaration for Freedom of the Internet” remained untouched, not only in this conference. For example, after the presentation, nobody was able to recognize that the EC proposal for a new AVMSD has an unclear regulatory concept for “non-linear audiovisual services” that will for sure affect the Internet; there was no discussion on which media could be qualified as “non-linear”, or what would fall under the basic tier regulation of the AVMSD proposal; the Internet community, which is not developed in Bosnia and Herzegovina, is still not worried about the possibility that weblogs, online video games, or private websites with advertisement banners, might also fall under the scope of Directive. Many other questions have not been addressed yet, and should be put on the public agenda as soon as possible.

On the other hand, principles contained in the new AVMS Directive, are part of the harmonization process of the legal system with *acquis communautaire*. Many parts of the new AVMS Directive are already integrated in existing Bosnia and Herzegovina laws and regulations for broadcasting and electronic media.

Acquis for the area of culture and audiovisual media is based on Chapter XII, paragraph 2 of Article 151 of the European Treaty signed in Rome in March 1957. Evolution of European legislation added to the *acquis* Directive of the European Council titled “Television without Borders”, establishing European and international coordination in the field of legislation, long-term objectives of reforms and administrative procedures in member states in the field of services. Other tasks and measures for member states and for Bosnia and Herzegovina are:

- It is necessary to harmonize all legislation from the field of audiovisual media with audiovisual *acquis* in accordance with the Directive “*Television without Borders*”
- To take over all relevant conventions of the European Council related to the field of culture and audiovisual media. Also, bearing in mind expansion of the film industry in Bosnia and Herzegovina, ratification of the European Convention on Cinema Production from Strasbourg 1992 as soon as possible is recommended.
- To enable development of a functional commercial broadcasting sector, since it is the only way to achieve the highest professional standards and pluralism of programming
- To undertake continuous and systematic activities in the field of education of journalists and other media professionals
- To support media self-sustainability, which is the key presumption for independent editorial policy?
- To improve court and legislative practice in the audiovisual sector through the full implementation of legislation harmonized with European legislation.

4. Danger of censorship

Bearing in mind the specific and complex internal political structure of Bosnia and Herzegovina, we should be very careful when speak about the media sector and media freedoms. The State of Bosnia and Herzegovina is divided into two first-order divisions or entities: the Republika Srpska (RS), which covers 49% of territory, and the Federation of Bosnia and Herzegovina (FB-H). It also comprises one internationally supervised district, Brčko. The country's constitution and political structure are regulated by the Dayton Peace Accords from 1995. Basically, there is a country-level government and presidency to coordinate some issues while each Entity has its own political structure and administration.

While the political Structure of the Federation is divided into three levels (entity, canton and municipality level), the political structure of Republika Srpska is much simpler, and it has entity and municipal level. In the Federation six different political parties participate in the government, while in Republika Srpska we have a classical one-party system. That is the main reason, as many claim, for constant political and economical pressures over media in Republika Srpska and many relevant organizations are worried about the status of media freedoms in this entity.

In Bosnia and Herzegovina, as well in its both entities, in recent several years there has been no single case of abusing media freedoms or exercising censorship over media contents on the Internet. Thus, we can conclude that Bosnia and Herzegovina is the country where media freedoms on the Internet are almost absolute.

5. Internet users

As a part of its regular activities, the Communications Regulatory Agency (CRA) carried out the annual survey among holders of the CRA licences for provision of Internet services in Bosnia and Herzegovina, in order to offer an insight in a market of Internet services in 2006, as well as a comparison with the situation recorded in previous years. The survey includes information submitted by Internet service providers in Bosnia and Herzegovina licenced by the Agency.

It would be thankless to speak precisely about exact users of the Internet in Bosnia and Herzegovina, with an exception when we speak about daily usage of Internet, because the percentages vary each month. Expert estimates for 2010 are that 40% of Bosnia and Herzegovina's population will be using the Internet. This estimate sounds fantastic bearing in mind that 20% of Bosnia and Herzegovina's population is currently illiterate. According to research and a regular annual report conducted by the Communication Regulatory Agency (CRA) in Bosnia and Herzegovina, in 2006 there were 237,660 users of the Internet and 13% of these are legal subjects. According to CRA data since 2002, the increase in the number of Internet users is more than evident. In 2002 only 4% of Bosnia and Herzegovina's population used the Internet; in 2003 it

was 7%; in 2004 15 %; in 2005 20.8 %; in 2006 24.5 %, and estimates for 2007 are that 26.5% of the population will use the Internet.

Revenues from Internet services totaled approximately 14,330,000 KM in 2004, with an 8% growth rate in respect to 2003. A thorough analysis of Internet services is beyond the scope of the present telecommunications sector overview, as in order to gather comprehensive data, a survey should have been conducted for all ISPs.

In the period which the CRA annual survey covers, including up to December 31, 2006, there were in total 52 Internet Service Providers (ISP) in Bosnia and Herzegovina. Out of that number, 43 active Internet Service Providers took part in this review. The results of the questionnaire show that there were in total 237,000 Internet subscribers in Bosnia and Herzegovina in 2006. In 2006, dial-up (which includes both dial-up and ISDN) was the dominant type of Internet access, making up 83.3% of the total number of Internet subscribers. Subscribers of broadband Internet make up 16.7% of the total number of Internet subscribers. Out of all types of broadband connection, the most represented is ADSL Internet access whose number of subscribers make up 9.32% of the total number of subscribers, followed by number of cable Internet subscribers (4.99%). In line with a definition of the International Telecommunications Union (ITU), according to which, an Internet user is any person from 16 to 74 years old that uses the Internet during a year, the Agency estimates that there were 950,000 Internet users in Bosnia and Herzegovina in 2006.

In addition to Internet access, Internet Service Providers (ISPs) in Bosnia and Herzegovina offer other services: 80% of companies offer webmail services; 77% webhosting; 44% game server; 61% FTP server; and 40% of companies offer forum services. ISPs are directly licensed by the Communication Regulator Agency, but network communicators and webpages are not. They are signing contracts with a chosen ISP and have agreed on terms and rules of operating, promising they will not abuse Internet space and freedom of expression in order to harm others, minorities, to post contents such as child pornography, pedophilia, terrorism and hate speech. For any violation or abuse they will go to court and for these cases, convergent regulators are not authorized. As Dunja Mijatović, expert for media and Internet regulation, claims “in modern democratic and civil society citizens themselves should make the decision on what they want to access on the Internet, as the right to disseminate and to receive information is a basic human right”. “Censorship should be generally unacceptable and should be avoided wherever possible”, she continues and adds, “Child pornography is an extreme example and there is already sufficient legislation to deal with those whose attempt to produce, distribute or view such material. Other forms of speech may well be truly offensive but the only way society can deal with them is by being exposed to them and combating them.” And finally, she thinks that “registration or licensing system for websites is both unnecessary and incompatible with the Internet’s unique set of characteristics: open, global, not dependent on a scarce spectrum and presenting very low barriers to potential publishers”.

It is forecast that these forms of communications will grow dynamically and intensively, allowing Bosnia and Herzegovina to have better communications with the world. Necessary measures defined in “EU Integration Strategy of Bosnia and Herzegovina”, and adopted by Council of Ministers of Bosnia and Herzegovina, in this sector are to:

- Effect measures to implement universal services defined in the Decision in the Telecommunication Sector in Bosnia and Herzegovina
- Build a simple regulation of the sector based on the principle of technological neutrality, geographic definition of the market for each service, and analyses of that market through the prism of the level of development of competition achieved
- Effect full reform of state-owned companies to increase interest in technological and service development of the sector
- Support the development of services of content, wide access and IT skills
- Support the development of e-society (education, administration, medicine, trade, etc.).

6. Conclusions and proposals

- In a democratic society, *citizens themselves should make the decision* on what they want to access on the Internet as the right to disseminate and to receive information is a basic human right – in this case, bearing in mind the user-controlled nature of the Internet, we considered government control and any case of censorship unnecessary.
- Bearing in mind that Internet impact can be both positive and negative, and that it can at the same time inform and allow borderless communication as well as deliver misinformation and unproven opinion, we have one tool to apply: *critical thinking in approaching Internet content*.
- It is recognized under international Freedom of Expressions principles and under the constitutional free expression protections of many countries that regulation of any medium must be based on the specific characteristics of the medium. *The Internet does not have those characteristics that support regulation usual for broadcast media*. The Internet is not technically limited by a scarcity of spectrum and thus opportunities to speak are not limited. There is no issue of technical interference. On the Internet everyone can be a publisher. We should have all these facts in mind before discussing Internet content regulation.

- Freedom of Expression and information has to co-exist with other fundamental rights and values – *any necessary restriction on this freedom should serve a legitimate purpose* and do not go beyond what is essential in a democratic society.
- There may be many reasons for the Internet's regulations, but there is a question of *how many ways there are to attain this*. It is increasingly apparent that it is not a question of whether regulation will occur, but rather *what type of controls will appear* within a given legal framework.
- *Internet filtering*, as a manner of blocking the access of children to content that may be harmful to their development, is not yet in use in Bosnia and Herzegovina. It could be a good solution for schools and kindergartens, in order to shield children from abusive and illegal content.
- We should make a difference between illegal content on the Internet and content that is legal, but this should not be for whole categories of what is potentially publicly available. Imperatives for protection on the Internet should be in the following fields: *protection of moral community standards, protection of children and preventing communication of various illegal materials*.

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